United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4264

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ORIGINAL

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

POLLACK ELECTRIC COMPANY, INC.,

Respondent.

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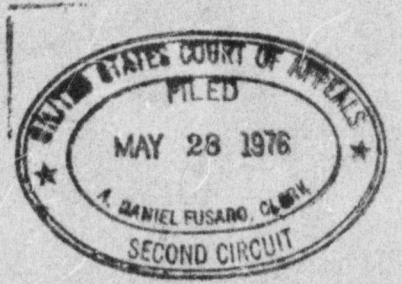
On Application for Enforcement
of an Order of the National
Labor Relations Board

BRIEF FOR
POLLACK ELECTRIC COMPANY, INC.,



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STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board had subject matter jurisdiction

over the Employer.

2. Whether there is substantial evidence in the Record to support findings that the Employer violated Sections 8 (a) (1) and (3) of the Act by laying off and terminating employees because of their union activities.

3. Whether there is substantial evidence in the Record to support a finding that the Employer violated Section 8 (a) (1) of the Act by threatening its employees and promising them benefits in order to discourage their union activities and by coercively interrogating them about such activities.

ARGUMENT

I. THE BOARD DID NOT HAVE SUBJECT MATTER JURISDICTION.

a. The Board Lacked Subject Matter Jurisdiction According To Its Own Standards.

Theoretically, the Board possesses jurisdiction over every labor dispute affecting interstate commerce. As a matter of practice, this has been limited by the de minimis

rule. However, the Board, on October 2, 1958, in NLRB Release No. R-576, decided that it would set definitive standards by which to determine jurisdiction and, accordingly, adopted certain "jurisdictional yardsticks". By so doing, the Board abandoned its previous case by case policy for determining its exercise of jurisdiction in favor of fixed standards, Siemons Mailing Service, 1958, 122 NLRB 81. Applicable hereto is the requirement that a non-retail business must do a minimum of $50,000.00 a year affecting interstate commerce, below which the Board would not assert jurisdiction. Exceptions, not relevant here, were provided for certain types of businesses, and for unusual situations where, for example, the employer refused to provide pertinent data, and the like.

There can be no question that the Employer does not even come close to the above standard. In 1973, its best business year, it purchased $3,600.00 worth of goods from New York firms which in turn received those materials from out-of-state businesses. It also performed electrical contracting services valued at $18,294.00 for New York firms which themselves engaged in interstate commerce. The total of $21,894.00 comes to about 45% of the Board's own minimum requirement.

The Board has never rescinded nor even revamped these particular yardsticks since their promulgation in 1958. It has decided probably hundreds of cases involving them in the past 18 years. Predictability is one of the vital purposes of law;

we have law so we know how to act. Certainly, the Board cannot ignore its own published rules, and most certainly, not arbitrarily nor in a discriminatory fashion. The courts insist on an agency's conjoining articulated standards and reflective findings, in furtherance of even-handed application of the law, rather than impermissible whim, or misplaced zeal, Greater Boston Television Corp. v. F.C.C., 1970, C.A., D.C., 444 F.2d 841, cert. denied 91 S.Ct. 2229, 2233, 403 U.S. 923. Yet, neither the Record, the Findings of Fact nor the Conclusions of the Board reveal the slightest reason why this particular very minimal employer was singled out.

Where an agency asserts jurisdiction in derogation of its own standards, the burden is cast upon that agency to demonstrate that its action is not arbitrary and discriminatory. The Board has utterly failed to do so. Courts must be alert to agency action which is arbitrary or capricious and take note of those situations where it has not adequately explained its departure from prior norms and has not sufficiently spelled out the legal basis of its decision. F.T.C. v. Crowther, 1970, C.A., D.C., 430 F.2d 510. The Record, in fact, indicates the opposite.

The number of workers do not warrant the intrusion of jurisdiction here. In 1970, the Employer employed two workers.

In 1971, three people were hired, later reduced to two. It went up to three again in 1972. And in 1973, its big year, four workers were employed most of the year, with six at the year end (A 116-119; 215-218).

Nor do the jurisdictional facts so closely approach the Board's own yardsticks as to justify an assumption of borderline jurisdiction. As above, the total dollar volume is less than half that required, with all but $3,600.00 consisting of work performed on electrical installations which stayed right where they were -- in New York State.

Nor does an unusual situation exist, as where, for example, the national defense or security is involved.

And, finally, there does not appear to be an alleged violation of such clear-cut quality that the Board may properly feel sanctions should be imposed at all costs. Obviously, a legitimate question is presented since the Regional Director, in the first instance, found for the Employer and dismissed the complaint.

The Board has arbitrarily and discriminatorily asserted jurisdiction over a tiny, individually-owned company in violation of its own rules without tendering a scintilla of evidence by way of jurisdiction.

b. The Board Lacked Subject Matter Jurisdiction Additionally Because The Impact On Interstate Commerce Was De Minimis

Some proof of legal jurisdiction must be made showing

that the employer's operations affect interstate commerce, NLRB v. Beneventо Sand & Gravel Co., CA 1, 1961, 297 F.2d 873; Hammonds, d/b/a 77 Operating Co., d/b/a Holiday Inn Restaurant, 1966, 160 NLRB (No. 68); International Longshoremen, Local 13, 1959, 124 NLRB 813; Jackson d/b/a Jackson's Party Service, 126 NLRB 875; Westside Market Owners Ass'n., 1960, 126 NLRB 1[illegible] There was not a dollar of business done by the Company in direct interstate commerce. As above, materials to the value of $3,600.00 were purchased from New York firms which procured them in turn from out-of-state. The remainder claimed to impact upon interstate commerce in the sum of $18,294.00 was revenue derived from local electrical work which never moved out of New York.

To claim that the latter could affect interstate commerce is to fly in the face of reality. These were services, not goods, and it cannot be argued that they could replace anything moving interstate. The relation of local activity to interstate commerce must be clearly shown for exclusive jurisdiction of NLRB, N.L.R.B. v. New York SLRB, D.C., N.Y., 1952, 106 F Supp. 749. Conceding that the $3,600.00 worth of materials does possess an interstate character, it is urged simply and earnestly that in this day and age and in the context of our business society, $3,600.00 is de minimis. The State Labor Boards are still in business.

c. Subject Matter Jurisdiction Was Not Conferred By The New York State Labor Board Proceeding.

The Board claims that the Employer, by oral stipulation before the New York State Labor Relations Board, waived subject matter jurisdiction in the present unfair labor practice proceedings. This is not conceded at all -- in fact it is vigorously disputed that NLRB jurisdiction was stipulated by the attorney for the Employer. The position taken at that time and place was described by the attorney and inserted in the Record herein (A 141;263). It negates a conclusion of concession of jurisdiction. But, in any event, as argued infra, no waiver took place because whatever occurred there did not affect and did not bind the Employer in any future event.

d. Subject Matter Jurisdiction Was Not Conferred By The Prior Representation Hearing Before the NLRB.

At the earlier representation hearing before the Board in June, 1974, the attorney for the Employer conceded jurisdiction; said concession was made for the hearing on the particular issue of representation, and for that purpose only. Nothing in the Record indicates the slightest intention or acquiescience that it be used for any other purpose. It is not at all uncommon in a legal proceeding to rely on one defense to the exclusion of another. It may be made for

convenience, because of the present unavailability of proof or for any other reason. One does not have to justify such choice. It is made for that charge only and it by no means denotes an irrevocable abandonment of that defense in a later and entirely different substantive context, albeit the adversaries may be identical.

Counsel for the Board ignores the fact of the overwhelming importance of proper subject matter jurisdiction. No more basic requirement of our entire judicial system exists. It is so utterly fundamental that it cannot be waived. Nor can the parties stipulate to it if it not be present. Even where a stipulation erroneous in its facts (as is this) is directly introduced into a hearing, the court may disregard it, Kaminer Const. Corp. v. U.S., 1973, 488 F.2d 980. Where made in an entirely different hearing and concerns subject matter jurisdiction, and is clearly contrary to the facts, it goes to the very heart of due process and must be ignored. cf. Williams v. Rogers 449 F.2d 513, cert. denied 92 S.Ct. 976, 405 U.S. 926.

A decision of any court or other agency concerning a matter over which it has no jurisdiction, has no binding effect whatsoever, Utah Const. & Min. Co. v. U.S., 1964, 339 F.2d 606, aff'd. in part, reversed on other grounds, 86 S.Ct. 1545, 384 U.S. 394. Innumerable cases recite that without clear juris-

diction, a judge must dismiss. Indeed, a judge should, sua sponte, make his own determination, requested or not, of the jurisdictional underpinning of a complaint, Kansas-Nebraska Nat. Gas Co. v. City of St. Edward, Neb., 234 F.2d 436, 439 and cases cited: Mayer Paving & Asphalt Co. v. General Dynamics Corp. 486 F.2d 763, cert. denied, 94 S.Ct. 899, 414 U.S. 1146, citing Fed. Rules of Civil Pro. 12 (h) (1,3), 13 (a), 19 (a) (2) (i), 28 U.S.C.A.; Stone v. E.D.S. Federal Corp. 351 F. Supp. 340.

Subject matter jurisdiction, to repeat, bears such enormous significance that it is axiomatic that it may be raised at any time, Greenbaum v. U.S. 360 F. Supp. 784; Yahr v. Resor 339 F. Supp. 964; Application of Honeywell, Inc. 497 F.2d 1344, cert. denied, sub nom Dann v. Honeywell, Inc. 95 S.Ct. 669.

The Board declares, however, that when its assertion of jurisdiction under one of its discretionary standards is contested, such issue must be "timely raised" (A 36). It cites neither a statute mandating this distinction nor cases differentiating between discretionary and non-discretionary subject matter jurisdiction, nor has the undersigned been able to discover any such. In fact, there exists no distinction with respect to when a jurisdictional objection may be raised, except in the statement of the Board. Subject matter jurisdiction must lie. Nothing -- absolutely nothing -- can give

a court or an agency the power to try a case without it. If a requirement of timely objection is imposed, an intolerable inconsistency is created, for you then say that a court or an agency can try a matter which lies beyond its jurisdictional perimeters.

But even if such a requirement were viable, -- and it is emphasized most strongly that it is not -- what and when is "timely raised"? Shortly after May 21, 1974, the Company made the claim, supported by relevant data, that it did not meet the Board's jurisdictional standards (ibid). The Hearing from which this appeal is being taken commenced January 28th, 1975, approximately nine (9) months thereafter. How much more timely must it be? Surely, the Union does not claim prejudice by way of surprise. Nor has it demonstrated resultant prejudice of any sort for any reason. It is to be noted that the Regional Director who heard the original complaint of unfair labor practices in June of 1974 did not consider the issue untimely raised, even then.

The Board, meanwhile, erroneously ignored incontrovertible proof that the Company fell far short of meeting the standards set by the Board although it was apprised of them three quarters of a year before the hearing, Consumers Union of U.S., Inc. v. Consumer Product Safety Commission, C.A. 2, 1974, 491 F.2d 810; NLRB v. Burns, C.A. 8, 1953, 207 F.2d 434. This Court has

said that an administrative agency must at a minimum exercise its jurisdiction where it properly lies and it must not ignore evidence placed before it by interested parties, Consumers Union, supra. For what has happened is that the Board has arrogated to itself the power to declare its own jurisdiction. This it may not do, J.B. Montgomery, Inc. v. U.S.D.C. Colo., 1962, 206 F. Supp. 455, aff'd 84 S.Ct. 884, 376 U.S. 389, rehearing denied 84 S.Ct. 1218, 377 U.S. 925; Martin v. Federal Security Agency, Social Security Board, D.C. Pa. 1947, 73 F. Supp. 482, aff'd 174 F.2d 364.

e. The Doctrines of Res Judicata and Collateral Estoppel Do Not Apply.

Counsel for the Board declares that:

> "By the same token, the Board, having found grounds for asserting jurisdiction over the Company in the representation proceeding, followed its long-established policy, analogous to the doctrines of res judicata and collateral estoppel, of prohibiting litigation of the same issue in a subsequent proceeding between the same parties", (Board Brief, p. 19).

Whatever this policy may be, it cannot be analogous to res judicata and collateral estoppel, for these principles do not apply. Jurisdiction cannot be conferred by estoppel, laches or waiver, Barrett v. Covert, 354 F. Supp. 446; Brown v. Fennell 155 F. Supp. 424, 429. Moreover, the matters of a representation election and alleged unfair labor practices

bear no substantive relation to each other; res judicata is entirely inapplicable. And it cannot be said that the Employer has had its day in court on the issue of jurisdiction, nor obviously has it litigated this vital issue to a determination. Finally, since the Board itself raises a rather shadowy estoppel, it should consider Seventeen-Fifty, Inc., 1961, 129 NLRB 1504. In that case, the Board had asserted jurisdiction in a representation proceeding. In a subsequent unfair labor practices action, the successor employer contested the Board's assumption of jurisdiction as based on erroneous economic data. The Board held that it would be inequitable to assert in the later hearing jurisdiction on the basis of erroneous data, as well as on the fact that it would impose the obligation to bargain on the successor employer, and dismissed the complaint. The federal court cases cited in the Board's brief fail to support its argument of the analogy of res judicata and collateral estoppel to the issue here presented. Not one of them deals with subject matter jurisdiction.

II. THERE IS NOT SUBSTANTIVE EVIDENCE TO SUPPORT FINDINGS THAT THE EMPLOYER VIOLATED SECTION 8 (a) (3) and (1) OF THE ACT BY LAYING OFF AND TERMINATING EMPLOYEES BECAUSE OF THEIR UNION ACTIVITIES.

The uncontroverted proof is that the discharges were a direct result of economic conditions. The evidence is clear

that at the time of the Union activity, the work of the Employer was declining. At the time of the discharges, the employees testified that there was no more than approximately one week's work left. The additional week's work was performed by the Employer and John Amorgianos. The work for the balance of the year was approximately one-third of the work for the prior year and clearly the Employer had economic justification for the discharge. The work force in 1973 was greater than at any time in the history of the Company. In 1974, the work force was consistent with the periods prior to 1973 (A 116, 117; 215, 216). The Employer hired no permanent employees during 1974 and the work for the year 1974 was consistent with the amount of the employees (A 118, 119; 218,219). The employment of John Amorgianos in 1974 also resulted in a period where the work was so slow that Mr. Amorgianos was laid off (ibid). The above testimony was uncontroverted and was consistent with the position of the Employer that the motive for the discharge was the decline in business.

The economic downturn in the construction business and the electrical field has been the subject of newspaper articles and has been reported in all media. The drop in construction work and in particular electrical work should be taken judicial notice of by the Board and by this Court.

The Board and the Courts have consistently held that there

is no discriminatory discharge where there was a severe decline in business, as is the case in this matter. See NLRB v. A.R. Gieringer Tool Corp., 314 F.2d 359; NLRB v. Croscill Curtain Co., 297 F.2d 294; NLRB v. McGahey, d/b/a Columbus Marble Works, 233 F.2d 406; Sam Aria d/b/a Sam Aria Hauling & Excavating Co., 193 NLRB (No. 69); Travel Queen Coaches, Inc., 192 NLRB (No. 27); Baker Machinery Co., 184 NLRB (No. 39); Henry Spen & Co., Inc., 150 NLRB (No. 21); Vitro Corp. of America, 140 NLRB (No. 72); Turner Canvas & Upholstery Co., 138 NLRB (No. 92); Sachs & Sons, 135 NLRB 1199; Worth Mfg. Co., 134 NLRB 444; Union Transfer & Storage Co., 134 NLRB 24.

Discharges were not discriminatory where ordered because of lack of work and in accordance with seniority. See NLRB v. Mt. Clemens Pottery Co., 147 F.2d 262; Munsingwear, Inc. (Hollywood Vassarette Division), 149 NLRB (No. 77); Crawford Clothes, 123 NLRB 9 and Alumatic Windows, Inc., 131 NLRB 1210.

Where there is a proper discharge for economic reasons, the Courts have held that anti-Union animus would not defeat the legitimate reasons for discharges. In the case of NLRB v. Atlanta Coca Cola Bottling Co., Inc., 293 F.2d 300, the Court stated:

> "This case unquestionably shows anti-union animus. At the same time, the record as a whole shows, beyond a doubt, legitimate management reasons for the discharges."

The evidence here does not show the Employer guilty of anti-union animus. The evidence is clear that the motivating

reason for the discharges was economic. The employees testified as did the Employer that business was declining and the employees testified that there was approximately one week's work left at the time of their discharge, clearly an economic reason for the discharge that was uncontroverted and consistent with the actions of the Employer.

If there is one week of work remaining, as the employees themselves testified, must an employer, who actually works in the field doing the exact same tasks, keep workers with but months seniority and give that work to them with the result that in five days he has no work for himself with which to earn a living?

The Employer fully cooperated with the Board. Two statements were given by the Employer and the Employer's books were open for any purpose the investigator or the Board desired. The General Counsel cannot now take the position that the books of the Employer and the testimony are not binding on it unless contrary evidence is produced. The Employer testified that he never turned down any work (A 142; 265). Nothing to the contrary having been produced by the General Counsel, the record shows a legitimate business reason for the discharges. The Employer hired no permanent employees since the discharges (ibid).

The conclusion by the Administrative Law Judge that the Employer followed a deliberate policy of reducing new or added business is contrary to the evidence and is extraordinary in

view of the economic conditions in the country. This Court should take judicial notice of the fact that the work in the construction industry had fallen by 80% in the last two years. This Employer had no mysterious procedure to increase his business or have his business continue at a level similar to that at a time when economic conditions in the construction industry are good. If the Administrative Law Judge or this Board knows of a procedure where an Employer in the construction industry can increase his business during this economic period, then it is incumbent upon the Administrative Law Judge to have set that particular procedure forth in his decision.

The work of the Employer was declining prior to December 1, 1973. The testimony of Pollack and the employees that work was declining during this period coincided. How could the Employer have followed a deliberate plan to reduce his business prior to the time when the alleged acts occurred or the Employer knew of the interest of Local 3? Anyone having even the vaguest background in business, particularly the construction business, must be aware that to obtain business the Employer must first bid, then obtain the work. This process takes many months and in many cases, years. If, as was the fact situation here, the Employer's business was declining in November and December, 1973,

this decline could only come about due to the fact that for many months prior to this period the Employer's business and business conditions in the construction industry was declining. This business decline had to antedate any activity upon the part of the Union. What is a fact is that the Union commenced organizational activity in the electrical industry because of the economic decline for the purpose of increasing the work opportunity for its members.

The Conclusion of the Board of this violation must be rejected in its entirety.

III. THERE IS NOT SUBSTANTIVE EVIDENCE IN THE RECORD TO SUPPORT A FINDING THAT THE COMPANY VIOLATED SECTION 8 (a) (1) OF THE ACT BY THREATENING ITS EMPLOYEES AND PROMISING THEM BENEFITS IN ORDER TO DISCOURAGE THEIR UNION ACTIVITIES, AND BY COERCIVELY INTERROGATING THEM ABOUT SUCH ACTIVITIES.

The Employer had from two to six employees at various times. The year in which its business was the greatest was 1973 with a total volume of approximately $75,000.00 (A 118; 218). The electrical contracting business has had and is a business where mechanics are assigned to particular jobs and because of their experience, run the job. This is historically the practice in the industry and was the practice of this Employer. The oldest employee in term of service is John Amorgianos (A 116;215).

The evidence is consistent with both the cases of the Board and the Employer, that the Employer first became aware of union activity when a notice and letter was received from the State Labor Board. An argument commenced among the employees, in particular those who were of Greek origin, and for the first time the Employer was aware of a prior conversation between the employees when the organizational activity commenced. The employees had agreed they would not sign cards and John Amorgianos felt that he was stabbed in the back when they signed cards after indicating to him that they all would not. The conversation was not initiated by the Employer nor did the Employer have the men in the shop for any reason other than to pay the weekly salary. Payment of the weekly salary in the manner that was being followed was consistent with all the prior payrolls. The men were paid and John Amorgianos stayed with the Employer. The question was asked by Mr. Amorgianos as to what were the Employer's intentions, and the Employer related what the economic situation was. There was a declining economic situation and the Employer stated that unless there was a change, he would be required to lay off the employees. Mr. Amorgianos on his own and in a fit of pique, called the employees the next day, a Saturday, to advise them that they were being laid off. The Employer learned of this on the following Monday and at that time, the Employer disavowed the action of Mr. Amorgianos and made it clear that his action was without authority. The

evidence of this is clear and Mr. George Handrianos testified that:

> "He says to us, no, I don't fire you because -- we say yes, your foreman -- your foreman call us. Everyone, and you must know that, he must tell you that, Saturday and he fire everyone. He says, I am the boss, I pay you and I fire you." (A 54; 21).

The testimony of the Employer is consistent with that Monday meeting where the Employer made it clear that Mr. Amorgianos' action was not consistent with the authority of Mr. Amorgianos, nor was it consistent with the Employer's intentions.

The subsequent discharges were consistent with the position of the Employer that unless economic conditions changed, he would have to lay the men off for lack of work. The Employer, when the men were laid off, laid them off for that reason only. The testimony of the employees verifies the position of the Employer that there was only four or five days more work when they were laid off (A 57; 25).

The General Counsel took certain incidents out of context and used the incidents to change the nature of the work of John Amorgianos. The testimony is clear that Mr. Amorgianos did the same work as the other mechanics. Mr. Amorgianos was the senior employee and the work and authority he had was that of an electrician. In a miniscule business the size of this Employer, it is unrealistic and not consistent with the evidence to conclude that John Amorgianos acted as a foreman in

a supervisory capacity for the Employer.

Amorgianos was used by the Employer as its Greek interpreter. All conversations went through Amorgianos as Pollack could not speak Greek. Amorgianos therefore had conversations with the employees about all the problems but the only one who made the decision or had authority to hire or fire employees, grant pay increases or take any action other than the normal decisions of a journeyman electrician, was Pollack. This was made clear by the testimony and the decision of the Administrative Law Judge reviewing the testimony of Thomas Nastos stated:

> "He subsequently asked Amorgianos for a second raise and, on not receiving it, asked Amorgianos again, upon which Amorgianos said to see Pollack; he saw Pollack and Pollack stated Amorgianos told him about the raise, but he had forgotten about it and Nastos would receive it shortly, which he did (to $3.75);" (A 5, 11-15).

Pollack testified that Amorgianos was required to tell the Employer about any requests by the employees and the Em ployer, through Pollack, would make the final decision. Amorgianos called the office and came to the office of the Employer during the course of each day and these requests were acted upon by Pollack, not Amorgianos. Amorgianos was simply the conduit and the employee with the most tenure.

The unit chosen by the Union and found by the Regional

Director to be appropriate included:

> "All electricians, electrical maintainance mechanics and helpers employed by the Employer at its Brooklyn, New York premises ***".

This unit included journeymen electricians such as Amorgianos. The activities of Amorgianos being consistent with those of a journeyman electrician in the trade, then any actions by Amorgianos could not and should not be attributed to the Employer.

CONCLUSION

Based on the above, it is respectfully submitted that the order of the Board should be reversed in its entirety.

Respectfully submitted,

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